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No. 51.

In the Supreme Court of the United States

October Term, 1933.

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, *Petitioner*,

vs.

UNION PACIFIC RAILROAD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

No. 51.

STATEMENT OF THE CASE.

Ellanore Andlauer, aged thirty-five, the mother of three children, and her husband, Marcus, while riding in the family automobile, driven by the husband, an experienced driver, were killed on a much-traveled public highway over a railroad crossing on December 11, 1927, at St. Marys, Kansas.

Petitioner is the administrator of the estates of Marcus Andlauer and his wife, Ellanore Andlauer. He instituted this action in a Missouri State Court to recover for the wrongful death of the decedents, as authorized by Section 60-3203, R. S. Kansas 1923. The action was removed to the trial court by respondent on the ground of diversity of citizenship (R. 4-6). The cause was tried on an amended petition in two counts (R. 6-16), answer (R. 16-22) and reply (R. 22). Respondent operates a railroad westwardly through St. Marys, Kansas. St. Marys is an incorporated town of about twelve hundred inhabitants. St. Mary's College adjoins the town on the east. There is a student body at the college from five hundred to one thousand and a faculty of about one hundred, all of whom lived on the campus in dormitories. Exhibit 1 (R. 30) is a plat showing the location. The entrance to the college is marked by the regular railroad crossing sign, and is a public and much-used crossing. Throughout the years it was much used on Sunday afternoons by the relatives of the students driving in to see their sons. The intersection, as admitted in the answer, was visible to the trainmen for more than a mile to the eastward as they approached the same (R. 18). The train was also visible to persons in the situation of the decedents, while turning towards, driving towards and moving on the crossing. There was no obstruction to the vision of either party. State Highway 40 parallels the track to the south. The south rail of the track is 71½ feet from the north edge of the highway at the crossing. On December 11, 1927, the decedents left their home in Topeka and drove west on Highway No. 40 to see their son at the college. The deceased were both familiar with the crossing. When they got opposite the college entrance

the automobile turned to the north and traveled without changing speed, estimated at from 10 to 15 miles an hour, from the highway to and upon the railroad track. When the rear wheels of their automobile got on the south rail (R. 56) respondent's train struck the automobile and carried it a distance of 1,752 feet to the west (R. 56-31). When the train stopped, the automobile was still on the cowcatcher, Mr. Andlauer was dead and Mrs. Andlauer so injured that she almost instantly died. Respondent's train was a regular passenger train from Kansas City. It was nearly two hours late (R. 55). It passed the college grounds at a speed estimated by witnesses of from 55 to 60 miles per hour. The evidence showed that at said speed it could be stopped within 1,000 feet (R. 59). No whistle was blown or other warning given by the trainmen. A Kansas statute required respondent's trainmen to blow the whistle 80 rods east of the crossing. The statute made the failure to blow the whistle a crime (Laws of Kansas 1925, p. 275). The city limit of St. Marys was 85 feet west of the crossing. An ordinance prohibited the operation of trains in excess of twenty miles per hour (R. 61). A custom had theretofore been observed by respondent's trains when passing the college grounds to slow down to from 25 to 30 miles an hour (R. 55). The wrongdoing on the part of the respondent charged in the amended petition and established by the evidence is here reproduced:

> "* * * that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting northbound public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach

of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing.''.

Respondent answered separately to the separate counts.

Respondent's answer omitted a general denial. It contained specific denials, but not as to all of the allegations. It did not deny the allegation that the automobile, and deceased therein, were in peril while turning toward and driving toward and driving on the crossing. The answer attempted to deny knowledge of the peril, but was ineffective for that purpose as it failed to comply with the Missouri Statute, Section 776, R. S. Mo. 1929. Said statute required the answer to generally or specifically deny each material allegation of the petition controverted by

the defendant, or any knowledge or information thereof sufficient to form a belief. The answer alleged that both occupants of the automobile failed to look for, and, hence, were unconscious of the approach of the train.

Paragraph III of the answer to Count I contains the following:

> "Defendant * * * denies that defendant knew, and denies that by the exercise of ordinary care it could have known, and denies that it had notice or knowledge, that the automobile in which Ella Andlauer was riding was approaching or in a position of peril in time by the exercise of ordinary care, by use of the means at the command of the defendant to have avoided collision or injury to Ella Andlauer, and denies that defendant knew, or by the exercise of ordinary care could have known that the said Ella Andlauer was in a position of peril or coming into a position of peril in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury." (R. 17.)

Said allegations on page 16 are duplicated as to Count II in paragraph III of said answer.

Paragraph IV of the answer to Count I alleges (R. 18):

> "* * * said Ella Andlauer, by the exercise of ordinary care, could have seen the approach of defendant's train *for more than one mile* before said train reached said crossing. The said Ella Andlauer, while riding in said automobile * * * *failed to look for said train* before going upon the track in front of the approaching train in time so that she could have notified her husband, who was driving said automobile, of the approach of said train before he

had driven said automobile upon the track in front of said train and in time to have avoided collision, and by the exercise of ordinary care the said Ella Andlauer could have avoided such collision."

Paragraph IV (R. 21) contains similar allegations as applied to Marcus Andlauer and then proceeds:

"* * * that the said Marcus Andlauer * * * failed to look for said train before going upon the track in front of the approaching train, in time so that he could have stopped said automobile and avoided said collision, and by the exercise of ordinary care the said Marcus Andlauer could have avoided such collision."

The reply consisted of a general denial to each count of the answer (R. 22).

The action was based upon Section 60-3203, R. S. Kansas 1923, which statute is set forth in the petition (R. 15), which statute authorized the personal representative to maintain an action for death when "caused by the wrongful act or omission of another."

The cause was called for trial in February, 1932. Petitioner offered evidence tending to prove the foregoing facts. At the conclusion of the evidence, respondent prayed the court to dismiss the plaintiff's case, with prejudice. This motion was sustained and a judgment dismissing the cause with prejudice was entered of record, all without petitioner's consent. The fact issues raised by the pleading were determined by the trial judge and were not submitted to the jury, either by peremptory instruction or otherwise. From this judgment petitioner appealed to the Circuit Court of Appeals for

the Eighth Circuit. That court filed its opinion on February 17th, 1933 (R. 62-69), and on February 20, 1933, rendered its judgment of affirmance (R. 69-70).

The petition for writ of certiorari was filed herein on May 8, 1933, and granted on October 9, 1933 (R. 75).

SPECIFICATION OF ERRORS.

1. The court erred in holding that the judge of the trial court, without the consent of petitioner, at the close of all the evidence, committed no error in rendering a judgment dismissing plaintiff's case, and in holding that the objection to the judgment as to such act was purely technical, and that petitioner's right to a trial by jury was not a matter of substance, but a matter of form.

2. The court erred in holding that petitioner had no right to recover on Count I of the petition.

3. The court erred in holding that petitioner had no right to recover on Count II of the petition.

4. The court erred in holding that Ellanore Andlauer was guilty of contributory negligence, as a matter of law.

5. The court erred in holding that Marcus Andlauer was guilty of contributory negligence, as a matter of law.

6. The court erred in holding that the petitioner could not recover on either count, under the rule of law known as the last chance rule.

7. The court erred in holding that the petitioner could not recover under the last chance doctrine (where the trainmen had no right to expect a clear track) unless there was evidence showing actual knowledge on the part of the trainmen of the position of peril of the deceased.

8. The court erred in holding that there was no evidence in the record from which the jury could infer that the trainmen had actual knowledge of the peril of the deceased.

9. The court erred in holding that the conduct of the trainmen exhibited such conscious indifference to the rights of the public as to deprive respondent of the defense of contributory negligence.

SUMMARY OF THE ARGUMENT.

I.

The statement of the last chance rule by the court below is in conflict with that of this and every other court on the question with reference to travelers in peril approaching and on highway crossings. That statement is (R. 67):

> "* * * the doctrine of discovered peril or last clear chance is not applicable because there is no proof that the employees operating the train had knowledge of the peril. This court has consistently held that such knowledge *must be actual.* It is bottomed on the theory that after the actual discovery of a person in peril, there is time in which by the exercise of ordinary care, to avoid the injury. In the instant case, there is no evidence that the employees actually discovered decedent's peril.
>
> * * * * * * * *
>
> The exception (last chance doctrine) is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. *It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such discovery in time to avoid the injury.*"

This statement of the rule conflicts with the statement thereof in *Ellzey* v. *Kansas City Southern Ry. Co.,* 275 U. S. 236, and in *Porto Rico L. & P. Co.* v. *Miranda,* 62 Fed. (2d) 479 (C. C. A. 1), stating the doctrine under the authority of this court in the Ellzey case (which it cites) thus:

> "* * * the last clear chance doctrine applies, although the defendant may not have seen and known of the dangerous situation of the plaintiff, if circumstances existed from which he should have anticipated the presence of plaintiff at the place of the accident and in the exercise of reasonable care could have seasonably avoided an accident."

The statement of the rule below also conflicts with that in *Tutwiler* v. *Lowery,* 279 Fed. 479 (C. C. A. 6), where the court decides that this court had never held that actual knowledge of the peril was necessary. It also conflicts with *Robinson* v. *Ry. Co.,* 112 Fed. 484 (C. C. A. 6), the late Justices Lurton and Day sitting; *Texas & P. Ry.* v. *Nolan,* 62 Fed. (C. C. A. 5), where the court held that the first statement of the doctrine in *Davies* v. *Mann,* 10 Mees & W. 456, was in conflict with that below, to-wit: that the doctrine applied because:

> "The servant of defendant either saw animal *or could have seen him in time to have avoided the injury if he had moderated his pace to a careful one.*"

It is also in conflict with *Railway* v. *Klutt,* 148 Fed. 818 (C. C. A. 6), certiorari denied, 204 U. S. 672.

It is also in conflict with the statement in a highway crossing case by the late Chief Justice Taft in *Baltimore & Ohio Ry.* v. *Anderson,* 85 Fed. 413 (C. C. A. 6), Justice Lurton concurring.

It also conflicts with the now leading decision on the question in the British Empire. See *British Columbia Electric Ry. Co.* v. *Loach,* (1916) A. C. 719; 10 British Ruling Cases 882, and with the opinions of the late Chief Justice Anglin of Canada, in *Columbia Bithulithic Company* v. *British Columbia Electric Co.,* 55 Canada Su-

preme Court 1, and *Brenner* v. *Toronto Ry. Co.*, 13 Ont. L. Rep. 423.

The statement by the court below that:

> "In the instant case, the Railroad Company produced no testimony and there was no evidence that the engineer or fireman, or any other employees in charge of the train discovered the Andlauers or their peril before they were injured, and hence the exception to the rule of contributory negligence cannot be invoked"

is, in effect, a decision formulating a new rule upon an important question of law, to-wit: That unless the perpetrator of a wrong admits it, it cannot be proven by facts and circumstances. This is contrary to the general rule on the question, and to the rule in the state where the cause was tried made applicable by the Conformity Act. (*Lynch* v. *Railroad*, 208 Mo., l. c. 21, also l. c. 24.) There it is said:

"Knowledge, like actual notice, may be proved by direct evidence, or it may be inferred from facts and circumstances." There the court held that the fact that the track was unobstructed for two-thirds of a mile, on a clear day, authorized the jury to infer actual knowledge of the peril on the part of the trainmen. The jury herein could infer that the trainmen actually saw the automobile and the peril from the fact that there was no obstruction, the day was clear, and no change in the speed of the automobile. (*Chapman* v. *Ry.*, 217 Mo. App. 312, Syll. 5.) The jury could infer that one blast of the whistle would have stopped the automobile and saved deceased.

> "It is not always necessary to show the train could have been *stopped* by those in charge by the exercise of ordinary care in order to invoke the humanitarian (or last chance) doctrine; a failure to stop, slow down or *warn* by bell or whistle may be sufficient to invoke the doctrine. (*Chapman* v. *Ry.*, 217 M. A., l. c. 324.)"

The ruling of the court on this question is in conflict with the law everywhere.

The ruling of the court below as to whether the trainmen had actual knowledge under the evidence conflicts with the opinion of this court in *Grand Trunk Railway Company* v. *Ives*, 144 U. S. 408, holding that

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

II.

The Seventh Amendment commanding that "In suits at common law where the matter in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" was ignored by the Court of Appeals in affirming the act of the trial judge in dismissing plaintiff's case at the close of the evidence, contrary to the decisions of this court in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, and cited cases, and contrary to the decision of the Circuit Court of Appeals for the First Circuit in the case of *Langwa* v. *Gorton Pew Vessels Co.*, 59 Fed. (2d) 315.

The court erred in holding that notwithstanding the Seventh Amendment commands that

> "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved."

And Sections 648 and 649, R. S. U. S., command that

> "The trial of issues of fact in the Circuit Courts *shall be by jury*, except in cases of equity and admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy *and by the next section.*
>
> Sec. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court without the intervention of a jury, *whenever the parties, or their attorneys of record file with the clerk a stipulation in writing waiving a jury,*"

that the judgment of dismissal was proper.

This contrary to the opinion of the Supreme Court in *Pederson* v. *Ry.*, 229 U. S., l. c. 153, holding that a trial court could not do so because "it was without authority so to do" and contrary to the opinion in *Slocum* v. *U. S.*, 228 U. S. 364, where the court cites and adopts the rule declared by Tidd as follows:

> "* * * where the case turns upon a question of fact, it ought to be submitted to the jury *unless the plaintiff's counsel expressly consent* to his being non-suited, a mere tacit acquiescence not being, it seems, sufficient."
>
> 2 Tidds Pr. 917.

III.

The Court of Appeals determined that plaintiff was not entitled to recover on either count, notwithstanding the failure to slow down while passing the college grounds to 25 or 30 miles per hour, in accordance with the custom, and notwithstanding the fact that decedents proceeded over the crossing on the assumption that the custom would be observed. Had it been observed the automobile would have been 80 feet north of the track when the train reached the crossing. The failure of the court below to give effect to the custom to relieve deceased from the imputation of contributory negligence as a matter of law conflicts with the law as declared in *Farrell* v. *Ry.*, 138 Fed. 28 (C. C. A. 2), and with the general law on the question as stated in Sec. 1669, Thompson on Negligence, and same section in both of White's Supplements to said work.

IV.

The Court of Appeals determined that deceased were guilty of contributory negligence as a matter of law, notwithstanding respondent's trainmen failed to comply with the custom and the statute requiring a whistle to be blown and notwithstanding the almost direct approach of the train prevented the deceased from knowing of the extraordinary and reckless speed and notwithstanding a warning whistle would have advised deceased of the fast approach and caused the automobile to stop before the collision. Before the court could hold Marcus Andlauer guilty of contributory negligence as a matter of law it would have to find that he knew of the unusual speed at which the train approached. Before it could hold Ellanore

Andlauer likewise guilty it must find she had like knowledge and also that her experienced husband was not exercising due watchfulness and care. The decision conflicts with the general law on the subject.

In Thompson on Negligence, Vol. VIII (White's Supplement), Sec. 1669, it is said:

> "Where the traveler sees a train at such a distance from a crossing that in the exercise of ordinary care he believes he can cross in safety he is not negligent as a matter of law in making the attempt, though it transpires that he miscalculated the distance and the speed of the train."

V.

The decision holding Ellanore Andlauer guilty of contributory negligence as a matter of law conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit, in the following cases:

Southern Pacific Ry. Co., 248 Fed. 261;
Trenholm v. *Ry. Co.*, 8 Fed. (2d) 452;
Southern Pac. Ry. Co. v. *Stephens*, 24 Fed. (2d) 182.

The decision on said point also conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Ry.* v. *Divine*, 39 Fed. (2d) 537.

The Court of Appeals for the Ninth Circuit in *Trenholm* v. *Ry.*, 8 Fed. (2d) 452, expressly holds that the decision by the 8th Circuit in *Bradley* v. *Ry.*, 288 Fed. 484, followed and applied herein conflicts with the rule on the same question applied in the Ninth Circuit and with "the weight of authority."

VI.

The decision of the court below that the trainmen could assume that the automobile would stop before going on the track was conditioned upon the giving of a warning of the unusually fast approach of the train and the opinion below on said point conflicts with those of this court in *Continental Ry. Co.* v. *Stead,* 95 U. S. 161, and *Texas & Pacific Ry. Co.* v. *Cody,* 166 U. S. 660, holding that the train "is bound to give due warning of its approach so that the wagon may stop and allow it to pass." The assumption that the train was coming at the usual rate of speed lulled the deceased into feeling that they could safely cross and made the warning imperative.

VII.

The Court of Appeals failed to hold that the respondent's trainmen in driving over the much-used public crossing at the excessive rate of 55 or 60 or 90 miles per hour at an unusual time, contrary to the custom to slow down to 25 or 30 miles per hour while passing the college grounds and into the city of St. Marys, in violation of its ordinance limiting the speed to 20 miles per hour, and committing a crime by violating the statute requiring the warning for the crossing and without any warning, exhibited such gross disregard for the rights of others and the public generally as to warrant an inference of wanton negligence or conscious indifference to consequences so as to deprive the respondent of the defense of alleged contributory negligence, and this contrary to the general law on the question as stated in Secs. 20, 22, Thompson on Negligence, and wealth of cases in *Breme* v. *Ry. Co.,* 318 Ill. 1, l. c. 17.

VIII.

The statement that:

> "Defendant denies * * * that defendant knew, or, by the exercise of ordinary care, could have known, that said Ella Andlauer was in a position of peril, or coming into a position of peril, in time to have given a warning of the approach of defendant's train, or to slacken the speed thereof, or to stop the train in time to have avoided collision and injury"

was not the denial required by Section 776, R. S. Mo. 1929.

Said section, with reference to a denial of knowledge, requires the defendant to deny:

> "* * * any knowledge, or information thereof, sufficient to form a belief."

The Missouri court, construing said section holds that an answer of the kind in question is insufficient and that a denial of knowledge, or information sufficient to form a belief, must be included in the pleading.

In *Revely* v. *Skinner*, 33 Mo. 98, l. c. 100, it is said:

> "Our statute requires that the answer of the defendant shall contain a special denial of each material allegation of the petition, controverted by the defendant, or of any *knowledge* or *information* thereof sufficient to form a belief, and every material allegation not so controverted is, for the purposes of the action, to be taken as true. * * * This section of our practice act is in the precise language of the New York code, and it has been repeatedly held by the Supreme Court of that state that the defendant must aver that he has neither

knowledge nor information, and the averment of one without the other is insufficient to controvert a material allegation."

See also *State ex rel.* v. *Gilbert*, 163 M. A., l. c. 683; *Watson* v. *Hawkins*, 60 Mo. 550.

Since the admission contained in the respondent's answer, by failing to deny that the deceased were in peril, while turning toward, moving toward, and moving on the track, and since the trial court found that the petitioner's evidence was true (R. 63), and since the respondent, by moving to dismiss and succeeded in having the petitioner's cause dismissed, admitted its liability to the petitioner, the only question to be determined is the amount of petitioner's damage.

This court, in *Gasoline Products Co., Petitioner*, v. *Champlin Refining Co.*, 283 U. S. 494, 501, holds that where the liability of a defendant is established and the damage can be ascertained without a trial of the issue of liability the case will be reversed with directions to try the issue as to damages only. Therefore, this case should be reversed with directions to the Circuit Court of Appeals to remand the case to the trial court with directions to empanel a jury to ascertain the amount of petitioner's damages only, as that is the only issue left to be tried in the case in view of the respondent's admissions.

Respondent's counsel have had no opportunity to reply to the following pages of this brief, for the reason that they have received the unpaged proof of same on Tuesday, November 7th. They did receive an unpaged proof of the preceding part of this brief on Saturday, Novem-

ber 4, 1933. Counsel for petitioner have had no opportunity to reply to respondent's brief, for the reason that they received an unpaged proof thereof on Tuesday, November 7, 1933.

ARGUMENT.

I.

The court erred in holding that petitioner had no right to recover on Count I of the petition for the wrongful death of Mrs. Andlauer. Said holding is in conflict with the rulings of this court denying certiorari in *Southern Pac. Co. v. Trenholm*, 270 U. S. 649, and *Chicago & Eastern Illinois Ry. Co. v. Divine*, 281 U. S. 765, and with the weight of authority on the question.

The opinion of the court below follows *Bradley* v. *Mo. Pac. Ry. Co.*, 288 Fed. 484 (R. 70).

The opinion in the Bradley case (288 Fed. 484) (the authority for the extraordinary opinion herein) was expressly disapproved by the appellate court for the Ninth Circuit in *Trenholm* v. *Southern Pac. Co.*, 8 F. (2d) 452. In discussing the proposition that a "passenger is as much under the duty of looking for locomotives as the driver," the court said, l. c. 454:

> "The principal case supporting this latter proposition is *Bradley* v. *Missouri Pacific R. Co.*, C. C. A. 288, F. 484, upon which the court below chiefly relied in directing the verdict in favor of the defendant in error. If we were to accept that extreme view of the law, there would seem to be no escape from the conclusion reached; but that view is not in harmony with the decision of this Court in *Southern Pac. Co.* v. *Wright*, 248 F. 261, and is not in our opinion supported by the weight of authority.
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> * * * * * * * * *
>
> A person of ordinary prudence, riding with another upon his invitation, will naturally put a certain trust in his judgment, and will rely in some measure on the assumption that he will use care to avoid the

ordinary dangers of the road. In order to conclusively charge a mere passenger with contributory negligence in failing to see an approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratituous passenger should not be found guilty of contributory negligence as a matter of law, *unless he in some way actively participates in the negligence of the driver,* or *is aware,* either that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or *that the driver is not taking proper precautions in approaching a place of danger, and being so aware fails to warn or admonish the driver, or to take proper steps to preserve his own safety.*"

In other words, under that authority it must appear that the passenger had *actual knowledge* that the driver was incompetent or careless or unmindful or *must have actual knowledge* that the driver is not taking proper precautions before the court can declare as a matter of law that the passenger was guilty of contributory negligence. Quoting from the New York Court, the opinion (*Trenholm* v. *Ry., supra*) proceeds:

"He had a right to assume that Mr. Welsh, his friend, would exercise reasonable care in the operation of his car; and unless he was aware of the railroad crossing, and had reason to apprehend that Mr. Welsh would run his car into a position of danger, the jury might properly find that he was in the exercise of that reasonable degree of care which an ordinarily prudent man would exercise under like circumstances, by merely sitting in his seat and

talking with a fellow passenger. That is probably what 75 per cent of the persons who go out for a drive with their friends do under the circumstances. They have no power over the car, no authority over the driver; and while they would not be free to ride with a reckless driver, knowing the fact, and charge their misfortunes upon others we do not think it can be said that there is a failure to produce evidence of a lack of contributory negligence when it appears, as it does here, that the plaintiff's intestate was sitting in his seat, engaged in a conversation with a fellow passenger who was occupying the seat behind him, and who was leaning forward for the purpose of carrying on the conversation, leaving the driver free to manage the car. Of course, if the passenger was familiar with a known danger, if he was better informed of the circumstances than the driver, it might be his duty to watch and point out the danger, but here the car was being driven upon a flat land, in broad daylight, and at an angle with the railroad track, which had been crossed some distance back and was to be crossed again at grade. It was an open country, and assuming that plaintiff's intestate was familiar with the country, which is the most favorable view for the defendant, it cannot be said as a matter of law that he was bound to anticipate that Mr. Welsh would drive upon the crossing without observing the situation and taking the necessary precautions."

* * * * * * * * *

"—we think the rule (above stated) best accords with the everyday conduct of the ordinarily prudent person under the circumstances, and that is the standard of due care."

This Court in *Southern Pac. Co.* v. *D. P. Trenholm, as Administrator, etc.*, 270 U. S. 649, denied the petition for certiorari notwithstanding it appeared from the

face of opinion (8 F. [2d], l. c. 454) that there was a direct conflict between the law, as declared in the Trenholm and Wright cases in the Ninth Circuit and that declared in the Bradley case in the Eighth Circuit. Had the opinions in the Trenholm and Wright cases improperly declared the law this Court, because of the conflict, would necessarily have granted the petition and reversed the Trenholm case and properly declared the law on the question for the country. These considerations demonstrate that the opinion of the Circuit Court of Appeals is in direct conflict with the ruling of this Court denying the writ in the Trenholm case.

In *Chicago & E. I. Ry. Co.* v. *Divine,* 39 F. (2d) 537, a husband and wife, with their children, while crossing defendant's tracks were killed by collision with a speeding train. "The accident occurred about noon on a clear summer day." (l. c. 538.) Two witnesses, as here, testified that the statutory whistles were not sounded. Following the rulings in *Northern Pacific Railroad Co.* v. *Freeman,* 174 U. S. 379, and *Chesapeake & Ohio Ry. Co.* v. *Steele* (opinion by Lurton, J., 84 F. 93), the court affirmed the judgment for plaintiffs. It was urged under the authority of opinions by the court for the Eighth Circuit that the wife should be held guilty of contributory negligence, as a matter of law. But the court said:

> "For anything that appears to the contrary, she might have realized the approach of the train and have been too much terror stricken to do anything; or she may have shouted a warning to her husband, and he, miscalculating the distance of the train, nevertheless, recklessly, if you please, undertook to cross. What could or should she have done to prevent it? * * * Even had she discovered the

> danger in sufficient time for averting the accident had she been in charge of the car, there is still nothing to indicate that, with another driving the car, she did not do all that a reasonable person under such circumstances would be expected to do to avoid the calamity. Without any evidence upon this subject, are we at liberty, as a matter of law, to reject every theory or surmise of what she did or failed to do, and adopt only such as would conclusively assume her negligence contributing to the accident? We think not."

And so here. The train passed Mr. Nagle about 500 feet east of the crossing and the engine was somewhat ahead of the witness when he saw it *at that distance.* He testified that he was "about 200 feet east of the crossing when the collision occurred" (R. 54) and (evidently confused) he further said he was 500 feet east of the entrance at that time. When the witness saw the train the automobile had just left the highway pulling into the college. Hence, no witness could, or did, testify as to any act of omission or commission by Mrs. Andlauer showing that she was negligent. She was sitting in the car, with her husband, and that is all. Does not the language in the opinion in the Divine case apply to her? Does it not properly declare the law on the question? We respectfully submit that it does for the conflicting opinions from the Eighth Circuit cited in the opinions and dissenting opinion in that case were before this Court when it denied the petition for certiorari in *Chicago & Eastern Illinois Ry. Co.* v. *Divine, Administrator,* 281 U. S. 765. And so the opinion of the court below is in direct conflict with the ruling of this court denying the writ in that case.

That in a case of this character, the liability of the railroad company for the death of the guest or passenger in an automobile is always one for the jury is shown by the opinion on this question in *Baker* v. *Ry. Co.*, 248 N. Y. 131. There the railroad company failed to sound bell or whistle while approaching the crossing at which a guest in an automobile was killed by a collision between the automobile and the train. The court unanimously said through Cardoza, Ch. J.:

> "Contributory negligence is urged, but again the jury must decide. If Vardon, the driver, were the plaintiff a different question would be here. The actual question is one as to the contributory negligence, not of driver, but of passenger. The case being a death one, the burden of proof on this issue was on the defendant (*Nicholson* v. *Greeley Square Hotel Co.*, 227 N. Y. 345; *Chamberlain* v. *Lehigh Valley R. R. Co.*, 238 N. Y. 233.) Baker may have given warning, and his warning may have been unheeded. There is testimony by Vardon that he was silent, but Vardon was a hostile witness. Nor is this the only explanation why Baker would be cleared of fault. Believing the car was about to stop, he may have thought the warning would be heedless, and discovering too late that the car was going on, he may have thought interference would be dangerous. These and like possibilities were to be estimated by the triers of the facts. They make it impossible to deal with the issue as a question for the court."

In *Crouch* v. *New York Central R. R. Co.*, 260 N. Y. 227, four young people were killed at a railroad crossing. On Sunday afternoon, July 1, 1928, shortly after 5 o'clock, in broad daylight, the Ford roadster was struck

at a crossing which was not a public highway crossing, but was a freely-used crossing. Said Pound, Ch. J.:

> "The duty of care at such a crossing might be found to be the same as at a public highway crossing. * * * The highway crossed the tracks at right angles. * * * The jury might have inferred that it gave no signals to indicate its approach. * * * Francis and his passengers were guests at a summer-cottage or camp on the lake. They knew of the existence of the railroad crossing. * * * The only eye-witness of the accident was Paul Woods, the locomotive fireman. On the first trial he said nothing about the conduct of the occupants of the automobile. On this trial he testified that none of them looked toward the engine at any time. The jury was not bound to accept his evidence on the point."

Holding that the railroad was liable for killing the passengers, the court said:

> "In the case of the passengers, the evidence does not demonstrate that they were not in the exercise of ordinary care for their own safety; that they did not call the attention of the driver to the approaching train or otherwise clear themselves from fault. There is no evidence which speaks one way or the other with reference to their contributory negligence. They may have given warning and their warning may have been unheeded. They may have seen the danger and thought an interference would be dangerous. (*Baker* v. *Lehigh Valley R. R. Co.*, 248 N. Y. 131, 136; *Nelson* v. *Nygrew*, 259 N. Y. 71.) The judgments in their cases must stand. In death cases the burden of proof is on the defendant (Cir. Prac. Act §265) and the jury must decide when the evidence presents an issue of fact."

In *Nelson* v. *Nygen*, 259 N. Y. 71, it was held that a guest asleep in an automobile could recover, and that it was not contributory negligence to sleep, citing cases from many states, including *Weidlich* v. *N. Y. N. H. & H. R. R. Co.*, 93 Conn. 438, at 442, thus, in part:

> "If he had been asleep, or reading a book, or engrossed in talk with another than the driver, or in deep thought, he would not have been negligent because of this. * * * No duty was upon the intestate to explain, excuse or justify his course."

In the Connecticut opinion, l. c. 441, 442, we find the following statement as to the duty of an automobile guest or passenger:

> "He is not expected to direct the driver, nor keep a lookout."

Countless authorities to the same effect might be cited. The judges who were responsible for the foregoing opinions differ with the court below as to the inferences to be drawn from the facts in this case. Yet the court below says that reasonable men could not differ as to the conclusion to be drawn.

II.

The court erred in holding that petitioner had no right to recover on both counts of the petition. Said holding is in conflict (a) with the authorities holding that driver had a right to proceed on the assumption that the custom to slow down would be observed; (b) with the authorities holding that under the facts and circumstances it was the function of the jury to say whether he was at fault; (c) with the authorities holding that under the antecedent negligence, humanitarian or last chance theories of the law the case should have been submitted to the jury; (d) with the authorities holding that the trainmen were guilty of conduct equivalent to wantonness.

The Court of Appeals overlooked the legal effect of the following facts stated in the opinion:

> "There was evidence that the train was traveling * * * 60 miles an hour, and there was testimony of two witnesses to the effect that they did not hear the crossing whistle sounded. There was also evidence that the train was about an hour late *and that it usually slowed down to from 25 to 30 miles an hour in passing by the St. Mary's College property.*
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> * * * * * * * * *
>
> "In effect, the negligence charged is * * * (2) failure to observe a custom theretofore observed by it to slow down its cars when passing St. Mary's College and entering the city limits of St. Marys."
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> * * * * * * * * *
>
> "An ordinance of the city of St. Marys limits the speed of trains within the city limits to 20 miles an hour.
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> * * * * * * * * *
>
> "As they turned north approaching the crossing they were traveling at a speed estimated at from 12 to 15 miles an hour and did not slacken nor increase that speed so far as the record shows."

(There was also evidence in the record that the speed was as low as 10 miles an hour, but this is not stated in the opinion.)

"The distance from the north edge of the highway to the south rail of the tracks 71½ feet."

The court's opinion, in holding that the deceased were both guilty of negligence as a matter of law, failed to give effect to the rule that the jury were entitled to infer every fact in favor of the plaintiff's case that reasonable men might reasonably find was established by said evidence.

The jury were entitled to infer that the automobile was the normal length of an automobile, to-wit: From 9 to 12 feet in length; that the automobile, from the time it started to turn north traveled the 71½ feet to the south rail, plus the length of the automobile or at least 80 feet; that the automobile was going as low as 10 miles per hour while traveling said 80 feet; that the train was going 60 miles an hour; that the deceased looked before they turned and saw the oncoming train to the east; that the driver assumed that the train was going at its customary rate for the opinion finds that he was familiar with the crossing and custom.

If, therefore, the automobile traveled 80 feet while going at 10 miles an hour, the train was at least 480 feet away at the time the decedents looked; then had the train been going one-half 60 miles per hour or from 25 to 30 miles per hour, in accordance with the custom, the automobile would have traveled just twice as far as it did travel after turning north to the point of collision. Under these physical facts, the automobile would have been in a place of safety 80 feet north of the track. A similar legal result follows if we say that the jury had a right

to infer that the automobile was going 12 miles an hour. If it were, then at the moment the automobile turned north the train was 400 feet to the east and so the automobile would have crossed in front of the train while 200 feet away.

The foregoing facts and considerations establish that notwithstanding the facts found by the court in its opinion demonstrate that deceased would have escaped had the defendant not negligently violated the custom which it had theretofore observed—a custom which the physical facts and circumstances show that it was necessary for it to observe—the collision could not have happened. Yet the court has entirely failed to give the usual legal effect to the facts found by it in its opinion and declared as a matter of law that not only was Mr. Andlauer guilty of contributory negligence, *but that his wife was also guilty of such contributory negligence.* We respectfully submit that this is a mere arbitrary finding on the part of the court which the physical facts found by the court in its opinion demonstrate to a mathematical certainty is contrary not only to the general law on the question, but contrary to the law as declared by this court in countless cases.

Furthermore, in addition to the facts stated in the opinion, the physical facts justified the inference that the train was going much faster than 60 miles an hour because, notwithstanding the fact that it could have been stopped, as the opinion finds, in several hundred feet, and as an expert witness said, in 1,000 feet, going at 60 miles an hour, yet it was not stopped until it traveled over 1,750 feet so that the jury were authorized to infer that the speed was as much as 80 or 90 miles an hour. Upon the hypothesis that it was going as much

as 80 miles an hour, then when the deceased looked to the east before they turned or at the time of turning, they saw a train 800 feet away which they had a right to assume was going at from 25 to 30 miles an hour and that they had ample time in which to cross. The opinion shows that the defendant was charged with negligence in violating the custom to slow down and the evidence stated in the opinion establishes the custom and the violation thereof.

We respectfully submit that the court entirely overlooked this pleaded and proven issue and wholly failed to determine the question as to whether or not respondent was guilty of negligence in violating the alleged custom and in determining whether or not respondent's negligence in said respect was the cause of the injury and wholly failed to determine whether or not the fact that there was such a custom deprived the court of power to declare as a matetr of law that Mr. Andlauer, or his wife, were guilty of contributory negligence.

(a) The traveler is not bound to anticipate negligence on the part of the railroad company, and hence has right to assume that railroad will operate its road or trains with the vigilance required by law and consequently comply with the law which requires it to blow the whistle. In this case, the Kansas statute required the defendant not only to sound the whistle at least eighty rods from the crossing, but to give the blasts in a peculiar way and made its failure to do so a crime. *A. T. & S. F. Ry. v. Sanders*, 22 Kan. 1.

Mr. Andlauer was familiar with the schedules of the trains and knew that ordinarily no train was due from the east at the time. The record is silent as to whether or not he knew a train was due from the west and hence Mr. Andlauer may have looked for a train from the west. Since the railroad company failed to blow the whistle from the east, it necessarily followed that the

court could not declare as a matter of law that reasonable men might not reasonably differ as to whether or not Andlauer was doing all that the law required him.

Grand Trunk R. R. v. *Ives*, 144 U. S. 408.

Andlauer had right to proceed on assumption that custom would be observed. *Farrell* v. *Ry.*, 138 Fed. 28 (C. C. A. 2).

> "Where the traveler sees a train at such a distance from a crossing that in the exercise of ordinary care he believes he can cross in safety he is not negligent as a matter of law in making the attempt, though it transpires that he miscalculated the distance and speed of the train."
>
> Thompson on Negligence, Sec. 1669 (White's Supplement).

In the same section of the original work, Vol. 2, p. 358, it is said:

> "Mere errors of judgment, where ordinary care has been exercised, are not generally set down as amounting to negligence."

In *Strauchon* v. *Ry.*, 232 Mo., l. c. 599, it is said:

> "* * * when one views an approaching train from a point directly in front of it, or from an acute angle * * * it is much more difficult to judge of its speed than if it is viewed from the side thereof, or from an obtuse angle. This fact is recognized by the law."

(b) The jury could have inferred in the absence of a warning whistle to Andlauer and because he knew that under the schedules no train was due from the east, that common prudence required him to look to the west for a train after he turned north, and hence he could not be convicted of contributory negligence as a matter of law. If he did not look to the east when 71½ feet or less from the crossing this was not, as a matter of law, contributory negligence under the circumstances.

In *Chamberlain* v. *Lehigh Valley R. Co.*, 238 N. Y. 233, the driver could have seen the train 600 feet from the crossing. Said the court:

> "The appellate division has held in substance that because the deceased did not look to the right when he was 105 feet or less from the crossing, in the direction from which the train came, and did not use the period of 9.2 seconds, or less, to stop his car and avoid the accident, he was guilty of contributory negligence as a matter of law.
>
> This we think was error. With one pair of eyes one cannot look in both directions at the same time. The duty of deceased was to look in both directions, keep control of his car, and negotiate it across the tracks.
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> * * * * * * * * * *
>
> —was he bound to assume that without warning a train would go over the Westbrook crossing, come up behind him into the 1000 or 1200 feet between the two highway crossings and emerge from behind the barn while he was looking toward the Westbrook crossing? * * * We think the question was for the jury."

The automobile in that case was traveling on a track paralleling the railroad, as was the automobile in the case at bar. It may be that Andlauer looked to the east some appreciable time before he turned north. If so the train had not yet come within his range of vision. If he knew it could not reach the crossing before he had crossed

if it observed the custom to slow down he could not be held negligent. We submit that under the Chamberlain case he cannot be convicted as a matter of law of contributory negligence. Had Andlauer looked to the east before he turned north, then it was for the jury to say whether or not he should have looked again before proceeding on to the tracks.

In *Carr* v. *Pennsylvania R. R. Co.*, 225 N. Y. 44, a crossing accident injured plaintiff (a driver) at noon on June 3, 1914. He was driving with his wife in a buggy. Reversing the judgment for defendant, and commenting on the law, it is said:

> "But it is not the law that as a distinct and conclusive circumstance, one must assume that no warning of the approach of trains will be given and relax in no degree his vigilance although silence suggests security, and it is not the law that one who has looked from a proper viewpoint must, at his peril, look again before proceeding.
>
> The evidence does not demonstrate the absence of care on the part of the plaintiff. It suggests that by greater care he might have avoided the accident. * * * We cannot accept his version and say as a matter of law that his negligence was palpable."

In *Horton* v. *Ry. Co.*, 237 N. Y. 38, l. c. 49, it is said:

> "Also as bearing upon the question of Horton's care and caution we may take into consideration the absence of any warning or notice of the approach of the train. * * *"

Citing *Wall* v. *Int. Ry. Co.*, 233 N. Y. 309.
Carr v. *Ry.*, 225 N. Y. 44, and
Barthelmas v. *Ry.*, 225 Penn. St. 597.

In *Schrader* v. *N. Y. C. and St. L. Ry. Co.*, 254 N. Y. 148, in a *per curiam* opinion, it is said:

> "If no warning is given of the approach of the train, silence may at times suggest some relaxation of vigilance, but not an entire absence thereof, as where a traveler has looked where he could see from a proper viewpoint, and is not required to look again immediately before proceeding onto the tracks (*Carr* v. *Pennsylvania R. R. Co.*, 225 N. Y. 44, 47).
>
> Each case is governed by its own conditions and circumstances. No two crossing cases are identical.
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> * * * * * * * * *
>
> This Court has never adopted or been influenced by the 'stop, look and listen' rule which was carried to such an extreme in *B. & O. R. R. Co.* v. *Goodman* (275 U. S. 66, 70) as to suggest a duty to stop and get out of one's vehicle to look up and down the tracks at a dangerous crossing before proceeding. Our rule of conduct is not standardized."

In *I. C. Co.* v. *Sollinger's Adm.*, 160 Ky. 455, l. c. 457, it is said of a decedent that because the law required whistles to be blown he had a right to rely upon the performance of its duty by defendant. Thus:

> "His mere failure to look, therefore, did not constitute contributory negligence as a matter of law; for he had the right to assume that the company would perform its duty by keeping a proper lookout, moderating the speed of the train and giving timely warning of its approach. Were we to adopt the rule contended for by appellant, then in every case the railroad company would be exempt from liability for accidents occurring on crossings. Manifestly in every case the decedent, if he looked, could see the train which killed him. Such is not the rule. In every case the question of proper care on the part of the traveler depends on a number of circum-

> stances, such as the number of trains passing, the condition of the weather, the speed of the train, the giving of proper signals, etc., and it is, therefore, uniformly held in cases of this kind that it is peculiarly within the province of the jury to consider all the surrounding circumstances, and say whether or not the traveler was guilty of contributory negligence."

In *C. & O. Ry.*, 200 Ky., l. c. 505, treating of the failure to give signals:

> "—where they are required it is the established rule that ordinarily a traveler may anticipate such signal from an approaching train, and it is a question for the jury as to whether it is negligence in him to rely on his hearing without stopping and looking."

(c-d) The Court of Appeals erred in failing to hold that the jury, under the evidence, were authorized to infer that the trainmen were at fault in that notwithstanding they saw, or by ordinary care could have seen, the automobile with the deceased therein, traveling on the highway toward the crossing without changing speed and that they were in a position of peril while turning toward, moving toward, and on the track, in time, by the exercise of ordinary care, to have saved them by blowing the whistle or slackening the speed of the train,

The court erred in that notwithstanding the opinion finds that the petition charged that respondent's employes, notwithstanding they knew, or by the exercise of ordinary care, could have known of the peril of the plaintiff's intestates approaching the track, they negligently failed to blow the whistle or slacken the speed of the train and thus killed the deceased. In denying recovery on this ground, the court held, notwithstanding the employes had no right to expect a clear track at the crossing, not-

withstanding the evidence shows that it was a much traveled crossing, especially on Sunday afternoon and had been for years before, yet that unless the employes committed willful murder, there can be no recovery against respondent for the killing, no matter how reckless and negligent the respondent was. In other words, the court held that in the Eighth Circuit there is no obligation whatsoever upon the part of the employes of a railroad train, either to observe a custom, when passing through a populous community, or over a much traveled crossing, or to obey an ordinance, and that they can with impunity ignore them and that if there be a shade of evidence justifying the inference that the person approaching, or going over the crossing, is negligent, that the railroad company is justified in killing the traveler on the highway. In thus deciding, the court has applied a principle which properly applies only to cases where there are trespassers upon the railroad track or where the trainmen have no reason to anticipate the presence of such persons. But the opinion declares that unless the plaintiff conclusively proves beyond a reasonable doubt that the trainmen had actual knowledge of the peril, then no duty arises upon the part of the trainmen with reference to the traveler, and that though the trainmen wholly disregard their duty to keep a reasonable lookout that the fact that they have no right to expect a clear track and that they are charged, as a matter of law, with the presence of travelers on the highway approaching and on the crossing, yet if they can show that they were guilty of negligence and recklessness in not keeping a reasonable lookout that the railroad company can take advantage of its own wrong as a defense to the application of the last chance doctrine. In other words, that the railroad com-

pany cannot be held liable for wrongful death unless its employees are guilty of willful murder.

It is true the court below has in many cases stated the rule that actual knowledge of the peril upon the part of the railroad employe is necessary and that the fact that he negligently keeps a lookout and violates his duty is a complete defense in such a situation. We respectfully submit that the court below is the only court in the Anglo-Saxon world that thus states and applies the last chance rule in a case as here where the trainmen were required to be on the lookout. As thus stated and applied herein, the opinion is in conflict with the opinion of this Court in *Kansas City Southern Railway Co.* v. *Ellzey,* 275 U. S. 236, cited in appellant's brief at page 51, where the Supreme Court thus defines the doctrine:

> "That doctrine, rightly applied * * * amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril *or unaware of it only through carelessness,* had in fact a later opportunity than the plaintiff to avert an accident."

The opinion hereon conflicts with the opinion on this identical question by the late Chief Justice Taft, when on the Circuit Bench, in *Baltimore & Ohio Ry. Co.* v. *Anderson,* 85 Fed. 413, and also in conflict with the opinion of the late Justice Lurton, in *Railroad Co.* v. *Cook,* 66 Fed. 119, when sitting in the same Circuit.

Justice Taft, in *Baltimore & Ohio Ry. Co.* v. *Anderson, supra,* thus defined the last chance rule at a railroad crossing where the injured person had a right to be as a rule wherein the negligence of the traveler on the highway

"—would not relieve the defendant from liability if they found that, by due care, the engineer and fireman might have stopped the train after they had seen, *or ought to have seen,* the position of danger in which the plaintiff, by reason of his negligence, was placed, and could thus have avoided injuring him."

* * * * * * * * *

"—the plaintiff here was on the highway where he had the right to be unless there was danger of his being run over by a train of the defendant, and *where the defendant was bound to anticipate the possibility of his being when it was using the crossing.*"

The opinion herein is also in conflict with the opinion in another Circuit in *Philadelphia & Reading Ry. Co.* v. *Klutt,* 148 Fed. 818, in which case the Supreme Court denied certiorari, 204 U. S. 672, and thus declared the law:

"It is a settled principle of law that, although a plaintiff, who sues for an injury inflicted by the defendant, might, by the observance of proper care, have avoided exposing himself to the injury, yet this will not prevent him recovering damages from the defendant, if the latter discovered, *or by the exercise of ordinary care might have discovered,* the exposed situation of the plaintiff in time, by the exercise of ordinary care and diligence, to have averted the effect of the plaintiff's negligence and avoided the injury which happened."

The opinion herein is also in conflict with the opinion in *Tutwiler* v. *Lowery,* 279 Fed. 479, in the Sixth Circuit. It is contrary to the opinion of the Kansas Supreme Court, in *McMahan* v. *Ry. Co.,* 96 Kan. 271, and in *Railway Co.* v. *Arno,* 67 Kan. 260, in which latter case

Federal Judge Pollock, citing *Coaching Co.* v. *Tolson*, 139 U. S. 551; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, held that if the operator of the vehicle which injured the traveler on a highway

> "* * * saw deceased in a position of danger, *or by the exercise of reasonable diligence should have seen* him in such position in time to stop the car before killing him and thus avoid the tragedy, the defendant is liable."

It is also in conflict with the opinion of the English Court, the highest court in the British Empire, in *British Col. Electric Railway Co.* v. *Loach*, (1916) A. C. 719, 10 British Ruling Cases, l. c. 892, in which case the court held that notwithstanding the jury found that the deceased was guilty of negligence contributing to his injury, and that it continued up to the moment of the injury, yet that the railway company was liable, notwithstanding it could not, after it actually knew, or could have known, of the peril of the deceased, have saved him by the exercise of ordinary care where the railway company was guilty of antecedent negligence which prevented it from saving the deceased after his peril became manifest.

It is also in conflict with the opinion of the late Chief Justice of Canada, in *Brenner* v. *Toronto R. Co.*, 13 Ont. L. Rep. 423, and with the opinion of Supreme Court of Canada in *Columbia Bithulithic, Ltd.*, v. *British Columbia Elec. Ry. Co.*, 55 Can., Can. S. C. 1.

In other words, there is no court, as above stated, in the Anglo-Saxon world, and no court in the United States except the court below, which holds that a railway company cannot be held liable for an injury at a highway crossing or a death occasioned at a highway crossing un-

less the plaintiff proves that the railroad employes had actual knowledge and were thus guilty of willful murder.

In *Porto Rico Ry. Light & P. Co.* v. *Mirandan,* 62 Fed. (2d) 479, the Court of Appeals for the first circuit so recently as December 29 held:

> "It has been a recognized rule in this circuit since 1914 that, in a situation like the one here found to exist, the last clear chance doctrine applies, although the defendant may not have seen and known of the dangerous situation of the plaintiff, if circumstances existed from which he should have anticipated the presence of plaintiff at the place of the accident and in the exercise of reasonable care could have reasonably avoided an accident.
>
> * * * * * * * * * * * * and this was so, even though defendant's motorman was not shown to have seen and known of plaintiff's dangerous situation before he ran upon her. * * *
>
> This court, in *Kansas City Southern Ry.* v. *Ellzey,* 275 U. S. 236, states the doctrine of last clear chance as follows:
>
> 'That doctrine rightly applied in the Chunn case amounts to no more than this: that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of plaintiff's peril, *or unaware of it only through carelessness,* had in fact a later opportunity than plaintiff to avert an accident.' " (Italics ours.)

So that *Kansas City Southern Ry.* v. *Ellzey* has been interpreted by the Court of Appeals of the First Circuit as defining the last chance rule directly contrary to the definition herein.

Section 60-3203, R. S. Kansas 1923, provides:

> "When the death of one is caused by the *wrongful act or omission* of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission." (R. 10.)

Laws of Kansas 1925, page 275, provide:

> "A steam whistle shall be attached to each locomotive engine, and shall be sounded four times (two long and two short blasts) at least eighty rods from the place where the railroad shall cross any public road or street, except in cities or villages * * * and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

The opinion finds that:

> "There was evidence that the train was traveling from fifty to sixty miles an hour, and there was testimony of two witnesses to the effect that they did not hear the crossing whistle sounded." (R. 66.)

The court assumed "that the evidence on the question of primary negligence was such as to entitle plaintiff to have had that issue submitted to the jury." (R. 68.)

Witness Nagle was riding in an open car, the day was clear and cold. His attention was attracted to the semaphore some distance east of the scene of the collision, while going west, and noticed that it was up, though he did not know that the approaching, or departing train, was within the block and hence was attentive. His hearing was good. He was at all times about seventy-one

and one-half feet from the track. There was nothing to contradict the affirmative testimony that:

> "* * * *there was nothing to prevent him from hearing the bell or whistle, if one had been sounded.*" (R. 54.)

Nagle was driving a car which did not make unnecessary or unusual noise; he had driven the same car before, and heard the whistle of trains while driving the same car. The other witness, Athletic Coach Quigley, heard no warning whistle, as found by the opinion (R. 70). The order of the trial judge recites:

> "The evidence is all on the part of the plaintiff and we assume that it is all true." (R. 63.)

This case is strictly within the rule applied in *Northern Pacific Railroad Company* v. *Freeman*, 174 U. S. 379, thus:

> "There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train approached the crossing. There was also testimony of the conductor, engineer and fireman that the whistle was blown. As the majority of plaintiff's witnesses *were so located that they would probably have heard the whistle if it had been blown*, there was a conflict in the evidence with respect to defendant's negligence which was properly left to the jury."

In *Detroit Southern R. Co.* v. *Lambert*, 150 Fed. 555, l. c. 557, the court states the same rule:

> "As to the question of signals, six witnesses testified for defendant below that signals were given, while four witnesses for the plaintiff below testified

they did not hear any whistle blown or bell rung. If we had the right to pass upon it, we should say that the weight of the testimony on this point undoubtedly was for the railway company, *but since some of the plaintiff's witnesses were where they ought to have heard the whistle, if it was blown,* it seems to us, taking the rule laid down in *U. P. R. Co.* v. *Freeman,* 174 U. S. 379, that there was a conflict of testimony which was properly left to the jury."

Justice Lurton participated in this decision.

In *Lehigh Valley Ry. Co.* v. *Mangam,* 278 Fed. 85, l. c. 88, it is said:

"If the witnesses who testified that the bell was not rung or the whistle sounded *were so located that they would probably have heard either one or the other, it was proper to submit their testimony to the jury.*"

Nagle was so located.

In *C. & O. Ry. Co.* v. *Steele,* 84 Fed. 93, Justice Lurton, with the concurrence of the late Chief Justice Taft, affirmed a judgment for the death of two brothers at a railway crossing, based on negative evidence as to failure to give signals.

In Jones, Com. on Ev., Vol. 1, page 37, it is said:

"Where positive testimony that signals were given is met by testimony in direct denial by witnesses who could well have heard them if they had been given, it is generally held that the latter testimony is positive in character equally with the former, so

that in a jury case the court is not at liberty to determine the issue by granting a non-suit or directing a verdict."

Wigmore on Evidence 1068, 1071, Vol. 1, says:

"Courts have often been asked to exclude testimony based upon what may be called negative knowledge, i. e., testimony that a fact did not occur founded the witness's failure to hear a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impression. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred.

Nevertheless, from some source not traceable there hinges in the judicial mind in many quarters an antiquated notion that negative impressions are not so probative as affirmative impressions. * * * Modern psychology sneers at the law's crude assumption that the complexities of human perception can be handled by some rules of thumb about negative testimony and the like."

In *Herrell* v. *Ry.*, 322 Mo. 551, Syl. 1, it is said:

"Testimony by a witness that he was standing within fifty feet of the whistling post, situated thirteen hundred feet from the crossing, and watched the train from the time it came in sight about a mile from the post until it passed him, and continued to watch it until it crossed the public road, and that at no time was the whistle sounded or the bell rung, and testimony by the injured plaintiff and other witnesses that they heard neither whistle nor bell, although they were in position to hear had

the whistle been sounded or the bell rung, is not negative evidence, but positive, and sufficient to sustain a charge that no statutory signal was given, and a common law charge that no warning or signal was given."

R. S. 721 and 914 operated to make the law there stated binding on the trial court.

As to Excessive Speed.

Respondent sought to have its rights determined upon the theory that the crossing in question was a grade crossing in the open country, but the facts here take the crossing out of the class known as a crossing in the open country. It was charged with knowledge that the crossing was opposite a crowded college and was used by the students and professors, and especially used on Sunday afternoons by visiting relatives. The students mostly lived at the college in dormitories, and on Sunday, in particular, there was more or less activity about the college grounds, more on Sunday than during the ordinary week day, on account of the visiting (R. 53).

Eighty-five feet west of the crossing the city limits of St. Marys began. A city ordinance prohibited the operation of a train "within this city at a rate of speed in excess of 20 miles per hour, nor in any manner which is dangerous to public safety," and provided a fine for violation thereof (R. 61).

The witness Quigley did not live on the college grounds. He lived at St. Marys and within the city limits (R. 33), 385 feet west of the center of the crossing and south of the track (R. 33). When the train passed Quigley approximately 400 feet west of the scene of the col-

lision, it was going at a tremendous speed and at least 50 miles an hour within the city limits (R. 58). The train was two hours late (R. 58), was seeking to make up time, could have been stopped in 1,000 feet at 60 miles an hour, but was not stopped until it traveled 1,752 feet west of the scene of the collision, and no bell or whistle warned the persons using the crossing of its approach at that terrific speed or warned the inhabitants of the city into which it crashed in violation of its ordinance of the fact that it was coming at an unusual time at said terrific speed.

In other words, appellee drove its death-dealing machine at the time and place in question as though the lives of the persons in said vicinity were unprotected by the laws. This short record shows that the acts of commission and omission of the appellee and its employees were grossly negligent, manifested reckless indifference and conscious disregard of the safety of human life and limb. Such terrific speed with warning under such circumstances would have been grossly negligent, but without warning, in violation of the Kansas statute, it was nothing more or less than reckless or wanton conduct, which was criminal.

In 52 C. J. 266, 267, the applicable law has been stated:

> "Where the servants or employees of a railroad company are guilty of wantonness or willfulness in inflicting an injury at a railroad crossing, the railroad company is liable therefor, notwithstanding contributory negligence on the part of the person injured. To constitute willfulness or wantonness the railroad employees must have done the negligent acts with the knowledge and consciousness that injury would probably result; a formed intent to injure or kill is not essential. Whether or not the

conduct of a company's servants in a particular case amounts to willfulness or wantonness depends on the circumstances of the case."

And in any event the question was for the jury (52 C. J. 468-469).

As pointed out in *Broussard* v. *Louisiana Western R. Co.*, 140 La. 517, 73 S. 606:

> "A speed of 30 miles an hour over a much-used crossing at the boundary line of the corporate limits of itself constitutes negligence rendering the company liable for the death of one killed by a train, *although the city ordinance limiting speed of trains was not applicable to the particular crossing.*"

What might not be considered excessive speed over a crossing if the statutory or other signals were given, yet may become excessive where they are not and the question is for the jury.

Norfolk, etc., R. Co. v. *Holbrook*, 27 F. (2d) 326.
Kelly v. *Director Gen. of Railroads*, 274 Pa. 470.
Schwartz v. *Delaware, etc., R. Co.*, 218 Pa. 187.

"Railroad had duty of not operating trains through village at greater speed than ordinary care warranted."

Railroad Co. v. *Van Dorp*, 173 N. E. 445.

"Special conditions, such as much-frequented crossing, may raise common-law duty on part of railroad to reduce speed on coming in sight of crossing."

Railroad v. *Jackson*, 130 So. 388.
Hines v. *Moore*, 124 Miss. 500, 87 S. 1.

It is negligence to run over a crossing at a high rate of speed without giving proper signals.

Morris v. *Railway*, 27 Fed. (2d) 326.

In *Central of Ga. Railway* v. *Pope*, 127 Southern 85, it is held that it is wanton conduct to run a train at a high rate of speed over a crossing without signals.

So that the evidence abundantly established negligent failure to whistle or warn and wantonly excessive speed.

The last chance rule as stated by the Court of Appeals only applies to trespassers or others for whom the trainmen are not required to keep a lookout and as stated and applied by said court there is a conflict with the general law on the question necessitating reversal.

The petition charged and the evidence tended to show that defendant

> "• • • operated its said train in a westwardly direction past the said college, through said thickly populated and traveled vicinity, over the said intersecting northbound public road at a high, dangerous and excessive rate of speed."

Those facts required the trainmen to be on the lookout.

The foregoing charge is coupled with the charge that

> "• • • defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew and by the exercise of ordinary care could have known, and had notice and knowledge, that the said automobile in which said deceased was riding and the said deceased was *approaching and in a position of peril* while *turning towards* and *moving towards*

and *moving on the said track,* in time by the exercise of ordinary care in the use of the means at the command of said defendant, to have avoided the collision and injury to the deceased, either by *giving warning* of the approach of said railroad train, or by slackening the speed thereof, or by stopping the said train, but that defendant negligently neglected so to do."

The answer admits the allegation that the automobile and its occupants were:

"* * * approaching and in a position of peril while turning towards and moving towards and moving on the said track."

An examination shows that paragraph III of the answer (Tr. 17-18) does not contain a general denial. The denials are all in said paragraph. The denials are specific and there is no denial of the peril *or of its existence as charged.* The answer merely denies:

"* * * that defendant knew, or by the exercise of ordinary care it could have known, and denies that it had notice or knowledge, that the automobile in which Ella Andlauer was riding was approaching or in a position of peril in time by the exercise of ordinary care by the use of the means at the command of the defendant to have avoided collision or injury to Ella Andlauer, and denies that defendant knew, or by the exercise of ordinary care could have known, that said Ella Andlauer was in a position of peril or coming into a position of peril in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury."

The Conformity Act made Section 776, R. S. Mo. 1929, applicable to said answer. Said section provides:

> "The answer of the defendant shall contain: First, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief."

The answer in paragraph III to each count did not contain either a general or special denial of the material allegation alleging the peril of deceased

> "While turning towards and moving towards and moving on the said track."

The special denial merely denies knowledge, actual or constructive, of the existence of the peril, *but not in the manner required by the statute.*

In *Revely* v. *Skinner,* 33 Mo. 98, it is said, l. c. 100:

> "Our statute requires that the answer of the defendant shall contain a special denial of each material allegation of the petition, controverted by the defendant, or of any *knowledge* or *information* thereof sufficient to form a belief, and every material allegation not so controverted is, for the purposes of the action, to be taken as true. The answer of Charlotte states that she has no information sufficient to form a belief, but does not state that she has no knowledge, etc. This section of our practice act is in the precise language of the New York code, and it has been repeatedly held by the Supreme Court of that state that the defendant must aver that he has neither *knowledge* nor *information,* and the averment of one without the other is insufficient to controvert a material allegation. (*Edwards* v. *Lent,* 8 Howard's Practice, 28; 1 E. D. Smith, 554; 20 Barb. 348.)"

In *State ex rel. Townsend* v. *Mueller,* 330 Mo. 641, l. c. 647, in June, of last year, the Missouri Supreme Court *en banc* reiterated the above doctrine, saying:

> "The return contains no general denial The answer to each paragraph of the petition is separate, specific and in every instance where the matter is pertinent states that the respondent has no knowledge of the facts alleged.
>
> "This does not tender an issue on such facts; they thus stand admitted under Section 776, R. S. 1929, which requires that an answer shall contain either a general or specific denial of the facts stated in the petition as a denial of 'any knowledge or information thereof sufficient to form a belief.' To say that the respondent has no knowledge of the facts alleged, does not meet the requirements of that statute."

From the foregoing it appears that the allegation that defendant had no knowledge of the peril of the deceased amounted to an admission of the allegations of the petition with reference to the *existence of the peril* and defendant's knowledge thereof *as alleged* under the time-honored rule that "the averment of one *without the other* is insufficient to controvert a material allegation." (*Revely* v. *Skinner,* 33 Mo., l. c. 100.) Furthermore, in the IV paragraph of said answer it is alleged:

> "The said * * * Ella Andlauer * * * failed to look for said train before going upon the track in front of the approaching train in time so that she could have notified her husband, who was driving said automobile, of the approach of said train before he had driven said automobile upon the track in front of said train and in time to have avoided collision."

This is a similar allegation in the answer as to Mr. Andlauer.

The answer also alleged that the train was visible for more than one mile away. These allegations in the answer were admissions that the automobile could be seen by the train employees on turning toward, approaching and going on the intersection for more than one mile east of same. Said allegations also established as a solemn admission that the automobile and those riding in it, to the knowledge of the trainmen, were in a position of peril as alleged in the petition. In *Allen* v. *Purvis*, 30 S. W. (Mo.) (2d) 196, l. c. 199, 200, the court said:

> "It will be observed that the question of obliviousness was not submitted to the jury. It is in effect argued that under the facts and circumstances in this case a position of imminent peril did not arise until the driver of the automobile knew or could have known that the pedestrian was oblivious to the approach of the automobile, or not being oblivious, was in such a position or condition as to be unable to extricate herself; and that this case presents one of the instances where obliviousness of danger on the part of plaintiff is necessary to make the situation in which she is placed one of peril. Appellant cites *Clark* v. *A., T. & S. F. R. Co.*, 319 Mo. 865, 6 S. W. (2d) 954, and numerous other cases instructive upon the subject of obliviousness in a given situation, and of facts constitutive of a cause of action under the humanitarian rule.
>
> But the point made by appellant cannot be maintained because the plea of contributory negligence charged that plaintiff was 'careless and negligent in failing to properly look out for the approach of automobiles.' That portion of the answer has been set out in the statement, and the contents thereof, under the law in this state, is equivalent to a statement that plaintiff was oblivious to her danger, and

> is an admission of such fact. It is unnecessary to prove an admitted fact, and equally unnecessary to require a finding of such fact by an instruction."

In *Woods* v. *Moffitt*, 38 S. W. (2d) 525, l. c. 528, the court said:

> "There is no merit in the contention that the evidence was insufficient to support the verdict under the humanitarian rule. It is said that there is no proof to show either when or where respondent got into a position of peril, that it is not possible to determine whether defendant could have avoided injuring him after he got in such position, and to submit the case to the jury was merely to permit a guess verdict. Such propositions wane in the light of the pleadings and proof. The conclusion is inevitable that plaintiff was in peril from the approaching car behind him; and, furthermore, peril and obliviousness were not contested issues, but were admitted by the answer. *Allen* v. *Purvis* (Mo. App.) 30 S. W. (2d) 196, 200, and cases cited."

In *McKenzie* v. *Ry.*, 216 Mo. 19, it is said:

> "It is fundamental that what is admitted by the pleadings is unnecessary to be shown by the testimony."

This general rule of law was made applicable in the courts below by the conformity act (R. S. 914). Hence the fact of peril from the time the automobile began to turn and the trainmen's knowledge thereof was established by defendant's answer.

The opinion of the court finds the facts as follows:

> "Here, the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly, and without looking or listening, drove onto this crossing without any knowledge of the approach of the train. They knew that they were approaching the crossing; they knew exactly where they were and where the crossing was. They had an unobstructed view of the approaching train, yet the car neither stopped, slackened its speed, increased its speed, nor turned to the right nor to the left, but went steadily forward. These physical facts and surrounding circumstances overcome all presumption as to the exercise of ordinary care, and conclusively establish that both the occupants of this car were guilty of contributory negligence, unless, as contended by appellant, the doctrine of discovered peril can be invoked." (R. 70.)

This statement of the facts brings this case within the principle stated in Section 16 of the report of the American Law Institute, Volume 10.

Said statement is:

> "Section 16. Last Clear Chance—Negligently Inattentive Plaintiff. A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant (a) knew or had reason to know of the plaintiff's situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm."

It is also on all fours (with the exception that the comment assumes the statutory whistle was blown) with the facts stated in the comment on said section in the illustration given therein:

> "Thus, if an engineer of a train approaching a level highway crossing sees a traveler approaching the track on foot or in a vehicle, he is not required to take any steps either to warn the traveler by an *additional blast* of his whistle or to bring the train under special control, since he is entitled to assume that the traveler has discovered or will discover the oncoming train and will stop before reaching the crossing. However, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. *It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. Even such a chance that the plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him.* Therefore, if there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive and, therefore, will or may not discover the approach of the train, the engineer must take such steps as a reasonable man would think necessary under the circumstances. If a train is at some little distance the blowing of a whistle would ordinarily be enough."

The opinion finds that the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly and without looking or listening, drove onto this crossing without any knowledge of the approach of the train.

If the author of the opinion could gather from the physical facts and surrounding circumstances detailed in the evidence that the occupants of the car, heedlessly and without looking or listening, drove onto the crossing without any knowledge of the approach of the train, why should not the trainmen, whose duty it was to be on the lookout and who were charged with the duty of exercising reasonable care not to injure the deceased, have seen and known that which the author of the opinion said was evident from the physical facts and circumstances?

The opinion gives two reasons why the last chance doctrine did not apply. In the opinion, the court says that unless the employees of the railroad company could assume under the physical facts and circumstances which demonstrated to the Court of Appeals that the plaintiffs, heedlessly and without looking or listening, drove onto the crossing without any knowledge of the approach of the train, failed to give any intimation to the trainmen that they were heedlessly and without looking or listening, driving onto the crossing. The opinion says if they could not so assume,

> "—then it would be necessary to stop the train at every highway crossing, wherever situate, or to approach it at such speed as to be able to stop the train whenever the train crew observed anyone approaching a crossing." (R. 71.)

The trouble with the statement is that the very purpose for which whistles or bells are attached to trains is to enable the trainmen to warn people in the situation of plaintiff's intestates as they drove toward the tracks. In the comment on Section 16, Am. Law Institute, Vol. 10, it is said:

"If a train is at some little distance *the blowing of a whistle would ordinarily be enough,* until it is apparent that the whistle is either unheard or disregarded."

The opinion omits to refer to the fact that the blowing of a whistle would have stopped the automobile and obviated the necessity of "stopping the train at every highway crossing or to approach it at such speed as to be able to stop the train whenever the train crew observed anyone approaching the crossing."

The Court of Appeals applies to persons in that Circuit on the public highways crossing railroad tracks the same rule which is applied to persons who are in peril at places where the persons injuring them have no duty to be on the lookout for them and have no reason to anticipate their presence. In other words, the Court of Appeals for that Circuit holds that all persons on the highway crossing railroad tracks are trespassers, and that the railroad company is under no duty or obligation to look out for them.

The English rule is that if the peril, although not actually discovered, could have been discovered by defendant in the exercise of ordinary care in time to have avoided the injury, the defendant is liable. *Sphingett* v. *Ball,* 4 F. & F, 472.

Even if actual knowledge was necessary herein to a recovery, yet such knowledge was shown by the facts and circumstances.

In *Wolosszanowski* v. *N. Y. C. R. R. Co.,* 254 N. Y. 206, the court said (as to a trespasser):

> "Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance (cf. *Bragg* v. *Central New England Ry. Co.*, 228 N. Y. 54) but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge."

The facts show that the trainmen incapacitated themselves from saving the deceased by failing to keep that lookout, which the law required them to keep, for persons using that highway. The fact that they failed to keep a lookout operated to excuse them from making any attempt to save human life under the opinion and decision of the courts below. For in the opinion, it is said of the last chance doctrine that it

> "* * * is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. *It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such discovery in time to avoid the injury.*"

The British court has recently ruled in *British Columbia Electric Company* v. *Loach*, 1916 A. C. 719, 10 British Ruling Cases 882, that whenever railroad operatives incapacitate themselves or the train, either negligently or willfully, from saving life or property from the loss occasioned or about to be occasioned by a collision with the train on a public crossing, then the railroad company is liable even though the killed or injured person was guilty of contributory negligence. This principle applies and operates to render the railroad company liable, whether the incapacitating circumstance be due to failure to keep a lookout, to driving at incapacitating, ex-

cessive speed or to sending a train out without proper stopping appliances. In said case, the jury found in response to special questions that the deceased was guilty of negligence which contributed to his death and that said guilt was occasioned by not taking extraordinary precautions to see the road was clear. The jury also found in that case that the railroad company could have avoided the accident if the brakes on the train "had been in effective condition."

The principle applied in *British Columbia Electric Company* v. *Loach, supra,* is sanctioned by the great name of Haldane. A suit by the owner of the vehicle on which the deceased was killed in *British Columbia Electric Company* v. *Loach, supra,* came before the Canadian Supreme Court in *Columbia Bithulitic, Limited, Appellant,* v. *British Columbia Electric Railway Company,* 55 Can. S. C. 1. This was a companion case to the Loach case. The evidence at the trial eliminated the defective brake as a producing cause of the injury but left the element of excessive speed. The question was whether or not under the decision of the Privy Council in the Loach case there could be a recovery because of incapacitating excessive speed. Ruling that under the principles of said case there not only could be a recovery, but must be, it was held, l. c. 29-30:

> "If the rate of speed under the circumstances amounted to negligence, and disability to avoid the collision resulted from it, it was just as truly 'ultimate' negligence which makes the defendant liable, as was the sending out of the car with a defective brake, which their Lordships so characterized in Loach's case because of the motorman's consequent incapacity to avoid killing the unfortunate Sands.

> That it would be negligent, without the warrant of statutory authority, to drive a railway train or a tram car when nearly approaching an unprotected highway level crossing at a speed approximately 40 miles an hour (as was done in this case) is indisputable. Under some circumstances it might be more than merely negligent; it might be criminal."

In the same case it was held that the statute providing for the "blowing of a steam whistle" permitted a speed "which at common law would be illegal" and that to keep the speed legal the train and speed must be accompanied by a whistle at crossings (1. c. 37):

> "The learned trial judge found—in my opinion properly—that the defendant's tram car was running at an excessive rate of speed in approaching the crossing. He also found that there had been contributory negligence by plaintiff's driver. He further found upon sufficient evidence that but for the disability created by the excessive and unreasonable rate of speed the motorman could have avoided the collision notwithstanding such contributory negligence. I am, with great respect, of the opinion that on these findings his conclusion that the defendant company was liable under the law as laid down in *Loach* v. *B. C. Electric Railway Company* was sound and should not have been disturbed."

Because of the applicability of the above decisions to the question now before the court we reproduce the decision in *British Columbia Electric Company* v. *Loach*, 10 British Ruling Cases 882, in its entirety:

"*British Columbia Electric Ry. Co., Limited, Appellants, and Loach, Respondent,* (1916) A. C. 719, 85 L. J. P. C. N. S. 23, 113 L. T. N. S. 946.

(July 26, 1915)

Present: Viscount Haldane, Lord Parker of Waddington and Lord Summer.

Appeal from a judgment of the Court of Appeal of British Columbia (January 6, 1914) reversing the judgment of the judge at the trial with a jury.

The respondent, as administrator of the estate of Benjamin Sands, deceased, brought an action against the appellants under the Families Compensation Act (R. S. B. C. 1911, Chap. 82) to recover damages in respect of the death of the deceased, which he alleged to have been caused by the negligence of the appellants. The above-mentioned act is in substantially the same terms as the Fatal Accidents Act 1846 (9 and 10 Vict., Cnap. 93, Imp.). The appellants denied the alleged negligence, and pleaded, *inter alia,* that the death of Sands was caused by his contributory negligense.

The accident which gave rise to the action occurred while the deceased was being driven by another man in a wagon called a 'rig.' The highway along which the wagon was proceeding crossed the appellants' track on the level at a point near a station and an orchard. While the wagon was being driven across the track it was run into by an electric car belonging to the appellants, with the result that the deceased was killed.

The following were the questions left to the jury by Murphy, J., at the trial and the answers thereto:

1. Was the defendant company guilty of negligence which was the proximate cause of the accident? A. Yes.

2. If so, in what did such negligence consist? A. Excessive speed under the circumstances; namely, a single track was in use for both-way passengers, and it was proved that passengers were waiting whose destination was unknown to the motorman or con-

ductor. Therefore the speed should have been slackened and the car brought under complete control approaching the station. Insufficient space between the orchard and station for observing approach of cars from the north.

3. Was the deceased, as distinguished from the driver of the rig, guilty of negligence which contributed to the accident? A. Yes.

4. If so, in what did such negligence consist? A. By not taking extraordinary precautions to see the road was clear.

5 and 6. If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident? If so, what? Answer fully. A. Yes; the motorman could have stopped the car if the brake had been in effective condition.

(Questions 7 to 10 were as to whether the driver of the rig, as distinguished from the deceased, had been negligent, and whether the appellants could have avoided the result of that negligence. The jury answered as in reply to questions 3 to 6.)

11. (a) Damages for widow? A. 5,000 dollars. (b) Damages for each child? A. 2,500 dollars.

After argument the learned judge gave judgment for the appellants on the ground that, the jury having found that both the defendants and the deceased had been negligent, there was no evidence of any further negligence on the part of the defendants.

Upon appeal the Court of Appeal by a majority (Irving, Martin and Galliher, J. J. A., Macdonald, C. J. A., and McPhillips, J. A., dissenting) reversed the above decision and gave judgment for the plaintiff for the amounts found by the jury.

* * * * * * *

This is an appeal from a judgment of the Court of Appeal of British Columbia in favor of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant

railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing, and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negligence in not looking out to see that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went right on to the 'track,' when he heard Sands, who was sitting on his left say, 'Oh,' and looking up saw the car about 50 yards off. He says he could then do nothing, and with a loaded wagon and horses going 2 to 3 miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the car and clear the rails. The car knocked cart, horses and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from 35 to 45 miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be 10 or 12 feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing. If the brake had been in good order it should have stopped the car in 300 feet. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient, and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of

vehicles being on the road, there can be no mistake in the matter, and their finding stands. It cannot be restricted, as the trial judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly braked car, or to a finding that there was no negligence except the 'original' negligence of sending the car out ill-equipped in the morning.

Clearly, if the deceased had not got on to the line, he would have suffered no harm in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

It was for the jury to decide which portions of the evidence were true, and under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there was nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective he could, as the jury found, have pulled up in time. Indeed, he would have had 100 feet to spare. If the car was 150 feet off when Sands looked up and said, 'Oh,' then each had the other in view for

50 feet before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the judges in the courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. 'You cannot charge up the same negligence under different heads,' said Murphy, J., at the trial, 'you cannot charge it up twice.' 'On the question of ultimate negligence,' he observed, 'that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the company had any opportunity between the time that this rig appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect, I think it was original negligence, and not what may possibly be termed "ultimate negligence".'

In the Court of Appeal, Macdonald, C. J. A., delivering a dissentient judgment in favor of the present appellants, said: 'Where one party negligently approaches a point of danger, and the other party, with like obligation to take care, negligently approaches the same point of danger, if there arises a

situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate negligence, in the sense of being the proximate cause of the injury. In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence, and to assign to it the whole blame for the occurrence, although by no effort of the defendants or their servants could the situation at that stage have been saved.'

So, too, McPhillips, J. A., also dissenting, said: 'Upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendants, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff. * * * The motorman, after he saw the vehicle, could not have stopped the car * * * therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death.'

These considerations were again urged at their Lordships' bar under somewhat different forms. It was said (1) that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said (2) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having

been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the fact. The consequences of the deceased's contributory negligence continued, it is true, but after he had looked, there was no more negligence, for there was nothing to be done, and as it is put in the classic judgment in *Tuff* v. *Warman*, (1858) 5 C. B. N. S. 573, 585, 141 Eng. Reprint 231, 27 L. J. C. P. N. S. 322, 5 Jur. N. S. 222, 6 Week. Rep. 693, 19 Eng. Rul. Cas. 194, his contributory negligence will not disentitle him to recover 'if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.'

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called 'primary' or 'original' negligence. The defendant may answer that by proving against the plaintiff 'contributory negligence.' If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called 'ultimate' or 'resultant' negligence. The opinion has been several times expressed, in various forms, that 'original' negligence and 'ultimate' negligence are mutually exclusive, and that conduct which has once been relied on to prove the first cannot in any shape constitute proof of the second.

Here lies the ambiguity. If the 'primary' negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the 'ultimate' negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is

the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the 'ultimate' negligence which makes the defendant liable?

This matter was much discussed in *Brenner* v. *Toronto R. Co.*, (1907) 13 Ont. L. Rep. 423, when Anglin, J., delivered a very valuable judgment in the divisional court. The decision of the divisional court was reversed on appeal in (1907) 15 Ont. L. Rep. 195; (1908) 40 Can. S. C. 540, but on other grounds, and in their comments on the decision of the divisional court, Duff, J., in the Supreme Court, and also Chancellor Boyd in *Rice* v. *Toronto R. Co.*, (1910) 22 Ont. L. Rep. 446, 450, and Hunter, Ch. J., in *Snow* v. *Crow's Nest Pass Coal Co.*, (1907) 13 B. C. 145, 155, seem to have missed the point to which Anglin, J., had specially addressed himself.

The facts of that case were closely similar to those in the present appeal and it was much relied on in argument in the court below. Anglin, J., following the decision in *Scott* v. *Dublin & W. R. Co.*, (1861) 11 Ir. C. L. Rep. 377, 394, observed as follows. (13 Ont. L. Rep. 437, 439, 440): 'Again, the duty of the defendants to the plaintiff, breach of which would constitute "ultimate" negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfill that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care. • • • Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the

result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty. But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavor to avert the impending catastrophe. * * * If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine qua non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. * * * Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. * * *"

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to

apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt; but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is, at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search, not merely of a causal agency, but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of facts of responsible human beings, between the damage done and the conduct which is tortious and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents which for this purpose are not the cause at all. 'Efficient or effective cause,' 'real cause,' 'proximate cause,' 'direct cause,' 'decisive cause,' 'immediate cause,' '*causa causans*', on the one hand, as against, on the other, '*causa sine qua non*,' 'occasional cause,' 'remote cause,' 'contributory cause,' 'inducing cause,' 'condition,' and so on. No doubt in the particular cases in which they occur they were thought to be

useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification.

In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise his Majesty that the appeal should be dismissed, with costs."

The physical facts in this case show that for some reason within the control of the railway company, or its servants, they either did not, or could not, avoid collision with the automobile, even after its peril became apparent. There was evidence tending to show that under the circumstances in question the train could be stopped in 1,000 feet. Yet it traveled 1,752 feet after it passed the crossing before stopping. The evidence of the Coach Quigley was that when the train was 385 feet west of the scene of the collision, it was still going fifty miles an hour and it took the train a full one third of a mile

before it stopped. The law presumes that the engineer and fireman saw the deceased approaching the track and on the track. (*Lynch* v. *Ry.*, 208 Mo. 1, l. c. 21-22.) The doctrine of the Loach case renders defendant liable.

It is true that the deceased, in the case at bar, had not placarded on themselves, or on their automobile, the words, in large letters, "We are helpless," "We are in peril."

They simply drove towards the track, without slackening or increasing or changing their speed. The fact that it did not change its speed was alone a fact from which the trainmen could have inferred that they were unconsciously going into peril. The rule is well stated in syllabi 5, *Chapman* v. *Railroad*, 217 Mo. App. 312, l. c. 313, thus:

> "Where automobile in which plaintiff was riding was in plain view of those in cab of approaching engine, was on engineer's side of engine, and could have been seen by those in charge of engine by exercise of ordinary care, *and automobile did not slow down*, in such case those in charge of the engine had no right to assume that the driver would stop before going upon the track, so as to excuse them from giving any warning whistle or ringing bell; evidence being that the automobile could have been stopped almost instantly."

l. c. 322, 323, the opinion is:

> "Do the facts justify the submission on the humanitarian doctrine? The automobile in which plaintiff was riding was in plain view of one in the engine cab of the approaching train from the time it started after plaintiff got in, and could have been seen by those in charge of the engine by the exercise of ordinary care, and especially by the engineer, as the

automobile was on the engineer's side. When the automobile turned west such fact evidenced an intention on the part of the driver to cross the track. The switch track was about twenty-five feet from the main track, and about the time the automobile went over the switch track the driver, Springer, shifted from low to second. If those in charge of the engine had been exercising the care required they would have seen that this automobile was approaching this track *with no indication of slowing down, and in such case they had no right to assume that the driver would stop before going upon the track.*"

Fact that there is no change in speed of automobile as it approaches crossing was evidence.

In *Gregory* v. *Ry.*, 270 S. W. 621, l. c. 623, the court said:

"* * * the jury might have found that the fireman was not keeping a lookout, as he said he was, or that, if he was keeping a lookout, *the appearance of the motorbus indicated that it was not going to stop.*"

And so herein.

The foregoing considerations and the facts found by the Court of Appeals demonstrate that the case could have been submitted to the jury on the ultimate negligence or last chance doctrine.

The statement of the last clear chance doctrine by the Circuit Court of Appeals, in the opinion below, shows that it wholly overlooked the opinion of this court in *Ellzey* v. *Kansas City Southern Ry. Co.*, and the opinion in the other Circuits directly in conflict therewith.

In Central Law Journal 215, it is said:

> "Indeed, no actual knowledge of the peril of the historic donkey in the highway was shown in the celebrated case of *Davies* v. *Mann*, 10 Mees & W. 546, 12 L. J. Exch. U. S. 10; 6 Jur. 954, 19, Eng. Rul. Cas. 190; the failure to discover and avoid the injury to him being the true ground of negligence."

Since the deceased had a right to rely upon the observance of the custom on the part of trains to slow down, and since mathematical calculation shows that they would have been north of the track some eighty feet before the train reached the crossing, and since the trainmen knew the speed at which they were approaching the crossing, this also was a circumstance which necessitated the blowing of a warning whistle or sounding of a bell, and as neither was blown or sounded, defendant failed in the performance of its last chance duty.

Another circumstance with knowledge of which the train operatives were charged was that the train was late and they were making up time. This court must judicially note that whatever the decisions may be with reference to the railroad track constituting a warning to travelers, yet if persons familiar with the location and familiar with the train schedules are about to cross, they will not be as careful as they would have been if they knew that a train was due. The deceased in this case were shown to have been familiar with the time this train passed every day, to-wit, an hour or two before they were killed, and since the trainmen knew that they were operating at an unusual time and at an unusual speed, they ought to know that persons familiar with train schedules would probably regulate their movements in accordance with the ordinary daily occurrences at that

crossing, and as well pointed out in the Chapman and Gregory cases, the fact that the automobile did not slow down was in itself a circumstance which operated to prevent the trainmen from properly assuming that it would do that which it could have seen it was not doing.

A reversal with appropriate directions is prayed.

Respectfully submitted,

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